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IN THE

Supreme Court of the United States

October Term, 1958

No. 631

JULES S. SOTTNEK CO., INC., SOTTNEK TERMINAL CORPORATION,

Petitioners,

v.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Respondent.

BRIEF OF THE RESPONDENT, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, IN OPPOSITION TO PETITION OF JULES S. SOTTNEK CO., INC., SOTTNEK TERMINAL CORPORATION FOR CERTIORARI

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Opinion of Court Below

The opinion of the United States Court of Appeals for the Second Circuit is reported in 258 Fed. 2d 85 and appears in Petitioners' Appendix, pages 19 to 25, inclusive.

Grounds on Which Jurisdiction of this Court Is Invoked

Review is sought of the judgment of the Court of Appeals, Second Circuit, in civil docket No. 24619 entered on the docket of said Court on April 12, 1957 on the grounds:

(1) The Court of Appeals, Second Circuit, has rendered a decision in conflict with the Court of Appeals, Third Circuit, with respect to the admissibility of documents under the evidence rule contained in 28 U. S. Code Section 1732.

(2) That the admission of documents into evidence under Section 1732 is an important rule of evidence which is not settled.

(3) That the decision appealed from conflicts with the decision of this Court in *Palmer* v. *Hoffman*, 318 U. S. 109, 63 S. Ct. 477, 87 L. Ed. 645.

(4) That although the Court of Appeals, Second Circuit, held the Fire Marshal's report to be inadmissible, nevertheless, it was allowed to stand as the basis of a finding of fact by the jury affecting petitioners' substantial rights, depriving them of property without due process of law and in violation of the Fifth Amendment of the Federal Constitution.

POINT I

The first ground assigned by petitioners for granting the writ has no basis in law or fact.

The Court of Appeals, Second Circuit, held that the Fire Marshal's report was inadmissible, therefore, it is difficult to understand how this decision conflicts with decisions in the Third Circuit.

Petitioner apparently relies on *Masterson* v. *Pennsylvania R. Co.*, 182 Fed. 2d 793, as a basis for the argument that the decision in the instant case conflicts with the Court of Appeals, Third Circuit. In the *Masterson* case the Court of Appeals held that although it was error for the trial court to admit letters of physicians to the Railroad's Chief Medical Examiner, the statements contained in the letters were merely cumulative of other evidence produced by the plaintiff, therefore, it did not constitute reversible error.

Another leading Third Circuit case is *Moran* v. *Pittsburgh-Des Moines Steel Co.*, 183 Fed. 2d, 467, 473, where the Court of Appeals, concerned with an accident investigation report of the Bureau of Mines, United States Department of the Interior, held as follows:

> "The report is no less admissible because it contains conclusions of experts which are based upon hearsay evidence as well as upon observation. These circumstances, by virtue of express statutory provision, go to weight rather than to admissibility. Moreover this Court has several times held that hospital records are admissible under the statute, and certainly medical diagnosis is no less a matter of opinion

based upon observation and perhaps hearsay than this report of the Bureau's investigation. *Bartkoski* v. *Pittsburgh & Lake Erie R. Co.*, 3 Cir., 1949, 172 F. 2d 1007; *Norwood* v. *Great American Indemnity Co.*, 3 Cir., 1944, 146 F. 2d 797; *Pollack* v. *Metropolitan Life Insurance Co.*, 3 Cir., 1943, 133 F. 2d 123."

In the light of the *Masterson* and *Moran* decisions, petitioners' argument appears untenable.

POINT II

Petitioners' second and third grounds for review are similarly untenable.

This Court's reasoning in *Palmer* v. *Hoffman*, 318 U. S. 109, has been the basis for lower courts rulings on the admission of documentary evidence. Indeed, in the present case, Judge Lumbard cites *Palmer* v. *Hoffman, supra*, as authority for finding the Fire Marshal's report inadmissible.

This Court did not say in the *Palmer* case, *supra*, that the admission of a report, such as the one with which we are concerned, would constitute reversible error. Thus, petitioners' argument that the decision conflicts with *Palmer* v. *Hoffman, supra*, is completely void of legal basis.

Further, as this Court has heretofore, in the *Palmer* case, set the yardstick for determining the admission of documentary evidence, petitioners' argument, that the rule is not settled, is likewise without legal basis.

POINT III

The fourth ground assigned by petitioners is not consistent with the finding of the Court of Appeals, Second Circuit.

The Court of Appeals found that the basis for the finding of fact by the jury was the testimony of the respondent's scow captain, the captain of the New York Central scow *Solvay* and the testimony of the two New York City Fire Marshals. This testimony established a causal relation between smoking and the fire. The Court of Appeals stated as follows:

> "We then come to the proof regarding negligence. The defendants maintain that the fire was caused by spontaneous combustion and produced as a witness a chemist who testified that spontaneous combustion possibly was the cause. A cargo checker in the defendant's employ also testified that while he was standing near the naphthalene he saw a trickle of liquid suddenly shoot out from the floor of the scow and burst into flame.
>
> "On the other hand, James Rugar, captain of the damaged scow, testified that he saw stevedores and crane operators smoking in the vicinity of the naphthalene during the noon hour. In this he was corroborated by Captain Barbir of the scow *Solvay* which had been anchored in the slip in front of the *CRR 230*. Captain Barbir further testified that he had seen men smoking about the bags less than 20 minutes before the fire started. From this evidence the jury could infer that carelessness while smoking caused the fire. See *U. S. Lighterage Corp.* v. *Peterson Lighterage Co.*, 142 F. 2d 197 (2 Cir. 1944). Indeed both of the city

Fire Marshals, one having been called by each side, testified that it was their opinion that the fire was caused by smoking negligence.

"The jury thus had evidence before them as to both of the explanations advanced. Under these circumstances, it was the jury's province to determine how the fire started and their verdict for the plaintiff must stand." (Pet's' App. pp. 22, 23)

POINT IV

The Court of Appeals, Second Circuit, did not err when it refused to hold that the admission of the Fire Marshal's report was reversible error.

It is elementary that the determination of the existence of prejudice from the erroneous admission of evidence depends in the final analysis upon the facts of the individual case. Here the jury was presented with the testimony of Captains Rugar and Barbir, two eyewitnesses to the fire. In addition, Chief Fire Marshal Scott stated without objection that in his opinion, based on over 35 years of investigating fires, smoking carelessness was the cause of the fire. In this he was joined, also without objection, by Marshal Canty, the author of the report now in dispute. In their effort to minimize the testimony of the Fire Marshals, petitioners erroneously state that the Chief Fire Marshal's opinion was based exclusively on the oral statements of numerous witnesses (Pet's' Brief, pp. 12-13). Actually, Marshal Scott's following testimony shows his opinion was based upon the physical evidence found at the scene of the fire as well as the statements of eyewitnesses (p. 433, Transcript of Testimony):

"Q. Now, Marshal, do you know how the fire started?

A. In my opinion I do, sir.

Q. How did it start?

A. I believe, it is my opinion, that is, the result of the investigation conducted under my supervision that it was caused by smoking carelessness.

Q. Now, Captain, what do you base that opinion on?

A. That was based on, first of all, eye-witness statements, the statements of eye witnesses who saw the fire at its origin and where it originated, plus the fact that the physical evidence found there by us connected with the origin of the fire and the statement made by other witnesses after the fire had its origin, who were persons who were at or near the fire at the time it originated, which was the basis of my opinion as to the cause of the fire." (433, Trial Transcript)

Respondents thus produced competent evidence of the cause of the fire and the admission of the report was merely cumulative. In 3 Am. Jur. #1028, Appeal and Error, the author states on pages 580-581:

> "In holding that the admission was not prejudicial error, the courts have conditioned their decisions upon various facts such as * * * that it was cumulative and related to a fact otherwise proved by competent evidence * * *." *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 74 L. Ed. 524, 50 S. Ct 220; *Meeker* v. *Lehigh Valley R. Co.*, 263 U. S. 434, 59 L. ed. 659, 35 S. Ct. 337.

Referring now to petitioners' argument that the report's admission constituted a violation of due process we

must merely look to petitioners' own reference to Mr. Justice Cardozo's opinion in *Roberts* v. *New York City*, 295 U. S. 264, 277, where he stated:

> "To bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action." (Pet's' Brief, pp. 16 and 17)

Even assuming it was error to admit the Fire Marshal's report it was not "gross and obvious".

POINT V

The Court of Appeals, Second Circuit, did adhere to New York decisions in holding the report inadmissible.

Judge Lumbard, in finding that the report was inadmissible, stated as follows:

> "It seems clear that the Fire Marshal's report would not be admissible in New York courts. New York Civil Practice Act. Sec. 374a; *Johnson* v. *Lutz*, 253 N. Y. 124 (1930); *Williams* v. *Alexander*, 309 N. Y. 283 (1955); *Cox* v. *State*, 3 N. Y. 2d 818 (1958). The federal rule would require the same result." (Pet's' App., pp. 24-25)

Here again there is no basis for the question presented by petitioners.

POINT VI

The Court of Appeals' reference to the admission of the Fire Marshal's report in evidence is dictum.

The discussion of the admissibility of the Fire Marshal's report by the Court of Appeals, Second Circuit, is dictum, as brought out by Chief Judge Clark in his concurring opinion reading as follows:

> "I concur in the affirmance and in the opinion herewith except for the dictum that the New York City Fire Marshal's report was not admissible in evidence. We need not decide that here; * * *"

Conclusion

Since the Court of Appeals, Second Circuit, held the Fire Marshal's report inadmissible but merely cumulative the petition herein establishes no conflict in decisions, raises no questions of wide import, nor presents any reasons for the exercise of this Court's supervision over the federal judiciary system. It should be denied.

Respectfully submitted,

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